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IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY M. EVANS, SR.
Petitioner

versus

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA
Respondents

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR *WRIT OF CERTIORARI*

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37 pp

QUESTIONS PRESENTED

I.) Whether the Louisiana Supreme Court erred in abandoning requisites established in *Daubert v. Merrell Pharmaceuticals,* for a *per se* admissibility rule of polygraph evidence in civil service hearings.

II.) Whether the Louisiana Supreme Court erred in accepting polygraph evidence as inherently reliable scientific methodology.

III.) Whether Louisiana Revised Statute Title 33 is unconstitutional as applied in this case by the Louisiana Supreme Court, as it allows a civil servant to be deprived of a property right without due process of law as guaranteed by the 5th and 14th Amendments of the United States Constitution.

IV.) Whether the refusal of the Louisiana Supreme Court to review the reliability of polygraph violated Officer Evans' right to substantive and procedural due process?

V.) Whether the Louisiana Supreme Court erred in placing the burden on an opponent of polygraph evidence to prove unreliability by providing the existence of irregularities in the procedure, contrary to *Federal Rule of Evidence* Article 104(a) and Louisiana's counterpart, *Louisiana Code of Evidence* Article 104(a)?

VI.) Whether the Louisiana Supreme Court erred in finding admissible, as an exception to the hearsay rule, hearsay statements of a convicted murder, part of which contained hearsay-within-hearsay of yet another convicted murder, as "statements against interest" as defined in *Louisiana Code of Evidence* Article 804B(3) and its counterpart, Federal Rule of Evidence Article 804(b)(3).

VII.) Whether the Louisiana Supreme Court erred in overturning the decision of the Third Circuit Court of Appeals, and finding sufficient evidence existed for termination of employment of Officer Johnny Evans, Sr., DeRidder City Police.

In compliance with Rule 14.1 (b) all parties to the proceeding are listed in the caption of the case.

In compliance with Rule 29.6 , it is disclosed that there are no parent corporations and no companies holding ten percent (10%) or more of the corporations stock involved in this case.

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State v. Rimmasch, 775 P. 2d 388, 398 (Utah 1989)

OPINIONS BELOW

The opinions of the DeRidder Municipal Fire and Police Civil Service Board, the 36th Judicial District Court for Beauregard Parish, Louisiana, the Third Circuit Court of Appeals of the State of Louisiana, and the Supreme Court of the State of Louisiana.

BASIS FOR JURISDICTION

The judgement of the Supreme Court for the State of Louisiana was entered on May 24, 2002. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. 1257.

STATEMENT OF THE CASE

The petitioner, JOHNNY M. EVANS, SR., has been in law enforcement a majority of his entire life. He served twenty-two (22) years in the United States Army, during which he was in the military police for fourteen (14) years. He had a Top Secret clearance rating. Following his military career, Officer Evans was employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life.

On or about June or July, 1997, Johnny M. Evans, Sr., contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due to his son's possible involvement in drug activity. Officer Evans advised these officers that his son was beginning to have expensive things, and he didn't feel as if he were making that much money at his present job. Officer Evans asked them if they would check him out to see if he were involved with drugs

(Tr. p. 38). In another incident, Officer Evans suspected his nephew, who was living with him, of being involved with drugs. He contacted Sergeant Pine of the DeRidder City Police, and summoned a drug detecting dog unit to search his house. The search yielded crack cocaine. Officer Evans has an unblemished record in life as well as in law enforcement. His actions have proven he will tolerate no wrongdoing, even by his own family members.

Petitioner, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997, for allegedly disclosing information concerning the identity of a drug informant, Earnest Prater, to his son, Johnny Evans, Jr., and Eric Pickens. The termination became effective October 31, 1997, at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police Arvin Malone, dated October 29, 1997, whieh stated, in pertinent part:

1. Patrolman Evans is a friend of Pickens:
   A. There is no logical reason Eric would makeup such a story on a friend.
2. Eric made accusations before he was a suspect and again after becoming a suspect.
3. It is apparent Eric and Johnny Evans, Jr., knew or Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.
   A. Many times different people are thought to be Confidential Informants For Law

Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people accused of being Confidential Informants as the suspects are accused of doing. This would indicate that they most likely had a strong confirmation from someone in position to know for certain what Prater's connection was with Law Enforcement, Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.
   A. Knew son was suspected of possible drug activities.
2. To protect Eric Pickens from possible arrest.
   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.
2. To protect himself f rom possible criminal charges.
3. To protect himself from possible civil liability.

4. To protect himself from possible administrative sanctions.
5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities, Judges, District Attorney, etc.

The petitioner, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment [see letter from Chief Arvin Malone dated September 25, 1997 (Tr. Ex. 3)]. As stated by the examiner,

> The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr.

On November 3, 1997, petitioner's counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") challenging the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997. On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Tr. pp. 203-205). Johnny Evans, Sr., appealed to the District Court, which affirmed the Board's decision. Johnny

Evans, Sr. appealed to the Louisiana Third Circuit Court of Appeal which reversed the ruling of the district court. Defendant applied to the Louisiana Supreme Court for a *Writ of Review* which was granted and briefing schedules were set. The Louisiana Supreme Court reversed the ruling of the appellate court, thereby reinstating the termination of employment of Officer Johnny Evans, Sr., from the City of DeRidder Police force.

REASONS TO GRANT WRIT

1. Petitioner's Procedural Due Process Rights were violated by admission of polygraph evidence without *Daubert/Foret* inquiry.
2. Louisiana Revised Statute 33:2561 unconstitutionally deprives petitioner's due process rights by prohibiting *denovo* review of fact finders legal determinations.
3. Petitioner's substantive and procedural due process rights were violated by Louisiana Supreme Court's *per se* acceptance of polygraph results as admissible in an administrative termination hearing.

ARGUMENT

QUESTION NO. 1 PRESENTED:

> "We find that these policy reasons support the admissibility of the polygraph results . . ." (La. Supreme Court Ruling, p. 8) **(Emphasis Added).**

In disregarding the mandates established in *Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 113 S.Ct. 2786, 125*

L. Ed. 2d 469 (1993), the Louisiana Supreme Court opted for a rule of admissibility, for polygraph evidence in administrative hearings, based entirely on policy. These "policy" reasons are set forth in its opinion, as follows:

1.) Jurisprudence upholding the termination of a civil servant for refusing to submit to a polygraph examination (p. 6).
2.) Reasons advanced by a leading commentator, Frank I. Maraist, supporting different treatment of evidentiary issues in administrative hearings (p. 8).
3.) Officers of the law are symbols of public trust and must remain above all suspicion, which demands immediate corroboration of his statement denying any wrongdoing (p. 8).
4.) Louisiana has enacted a statute regulating polygraphists, La. R.S. 37:2831, *et seq.* (p. 8).

The jurisprudence relied upon by the Court, as a policy consideration, does not support admissibility, however, absent reliability determinations and procedural safeguards. In *Creadeur v. Department of Public Safety, Division of State Police*, 364 So. 2d 155 (La. App. 1 Cir. 1978), an officer was terminated for refusing to submit to a polygraph examination. In confirming the termination, the Louisiana First Circuit Court of Appeals considered the reasonableness of the request and was impressed by testimony from the appointing authority that the results would not be used to discharge the officer. *Id.* at 156. In the case at bar, Officer Evans was offered no such condition and/or limitations.

Clearly, the rule of admissibility articulated by the Louisiana Supreme Court can only lead to misuse and abuse especially by panels of lay persons -- of even the most basic evidentiary procedures and principles.

QUESTION NO. 2 PRESENTED:

State of Louisiana v. Foret, 628 So. 2d 1116 (La. 1993) is the case in which the Supreme Court of Louisiana adopted the *Daubert*, *Id.* requirements for the admissibility of expert scientific testimony. Foret, Id., dealt with the admissibility of psychological testimony based on Child Sexual Abuse Accomodation Syndrome (CSAAS) to bolster witness credibility. Therein, the Louisiana Supreme Court was reviewing a record which was silent regarding any efforts by the trial court (to fulfill its "gatekeeping" function) to determine the soundness of testimony based on CSAAS.

At footnote 8, the Louisiana Supreme Court noted the standard for acceptance of such expert testimony, absent an evidentiary hearing on its admissibility.

> "8. In the absence of such a hearing, only a scientific method's proven 'inherent reliability' will allow a court to take judicial notice of the accuracy of scientific testimony and evade the requirement for an evidentiary hearing on the reliability of such testimony. See *State v. Rimmasch*, 775 P. 2d 388, 398 (Utah 1989). The *Rimmasch* court went on to note that CSAAS was not so inherently reliable so as to justify a court's taking judicial notice of the

> reliability of such testimony. *Id.*, at 401."

In recognizing this absence, the Louisiana Supreme Court seemingly conducted its own *de novo,* review of CSAAS reliability (presumably, the authorities and treatises considered by the Louisiana Supreme Court are not contained in the record, as the Court stated at p. 1124, "If the trial court had conducted a hearing, it might have discovered the misgivings many experts and courts alike have with the this type of testimony . . ." *Id.* at 1124).

In the absence of the necessary evidentiary inquiry by the lower courts, the Louisiana Supreme Court in *Foret*, felt compelled to conduct the same. Certainly, the judiciary is under no less of a burden when the case and accompanying opinion originate from an administrative panel of lay persons. In failing to do so, the Louisiana Supreme Court has accepted polygraph evidence as a science which is inherently reliable.

While reaching its conclusion, the Louisiana Supreme Court acknowledged that "competent" evidence (as when it accepted the polygraph results) is evidence that "has some degree of reliability and trustworthiness and is the type that reasonable persons would rely upon," (p. 8 of opinion, citing *Chaisson v. Cajun Bag and Supply Company*, 708 So. 2d. 375 (La.1998). In support of its conclusion, the Court relies on one (1) paragraph of facts, which include:

1.) the polygraphist has been licensed by the State of Louisiana since 1985, board certified, conducted polygraphs for numerous state agencies and has conducted a total of approximately 500-600 polygraphs;
2.) the polygraphist was cross-examined vigorously on the possible inaccuracies of polygraph;
3.) no irregularities in the test were established that would be groundsfor excluding the polygraph in this case.

Accordingly, the Louisiana Supreme Court has concluded from one (1) skeletal paragraph of facts an issue which continues to be divisive among higher authorities.

> "The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques". *U.S. v. Scheffer,* 118 S. Ct. 1261, 1264.

In determining whether the expert is proposing to testify to opinion based on scientific knowledge, the record must include an inquiry into the evidentiary relevance and reliability of the principles that underlie a proposed submission. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). Such factors include:

a.) What is the known or potential rate of error?
b) What standards exist to control the techniques operation?
c.) Can the hypothesis be and has it been tested?
d.) Has the theory or technique been subjected to peer review and publication?

e.) What is the degree of acceptance of the technique within the relevant community? *Id* at 2797

While the polygraphist in this case submitted an unbelievable rate of error of one (1%) percent, the most telling disclosure was that this rate of error is <u>not</u> verifiable.

"Q. Have you ever made a mistake in any of these five or six hundred polygraph examinations you've conducted?

A. Yes, sir, I have.

Q. And about how many?

A. Well, verifiable would be difficult; but I would say the number would be between five and ten." (Tr. p. 136 lines 8-13)

This record is somewhat silent on the existence of standards to control the technique's operation. Likewise, it is respectfully submitted that there are no established procedural safeguards to insure accuracy in the administration of the polygraph. The machine used on Officer Evans was the Auther VI (Tr. p. 125), which, according to the polygraphist is <u>not</u> in general use. (Emphasis Added).

"Q. And was the polygraph used for the examination of Mr. Evans an instrument in general use?

A. Well, it's not an instrument in general use, because Dick Arther has polygraphs made to his specific -- to his specifications, as opposed to nowadays you can get them that's computerized and people go with computer. You can get polygraphs that are electronically enhanced. The Arther VI that I use is not electronically enhanced. In other words, the recording is an actual recording from the person; it is not enhanced to get a better reading off of it." (Trans. p. 124 lines 21-25 and p. 125 lines 1-5)

The most notable disclosure by this polygraphist was a total lack of knowledge as to how his machine (Arther VI) functioned.

"Q. You're not an engineer of any kind?

A. No, sir, I'm not.

Q. Electric engineer or anything of that sort?

A. No, sir.

Q. And you didn't build this polygraph?

A. No, sir, I did not.

Q. And you don't know, from an engineering standpoint, what makes that part of it work?

A. I am not an electronic engineer; I don't know what makes it work" (Tr. p. 129 lines 10-19).

Yet, notwithstanding this total lack of knowledge of the inner functions of the Arther VI, and the non-existence of safeguards regulating repair, this polygraphist performs his own repairs when his machine malfunctions or breaks.

> "Q. You indicated, in response to Mr. Lestage's questions, you're not an engineer. You don't know how that machine works, it's inner - - I mean, you don't know its inner functioning. You couldn't take it apart and put it back together.
>
> A. Well, I don't say I couldn't do that, because I do my own repairs. But as far as taking - - looking at the little transformer and know why that transformer does all this, no. But if there's something wrong with my polygraph, I generally fix it myself. If that transformer needs changing, I'll order a new one and change it. But as far as what makes the transformer, you know, affect the components inside, no" (Tr. p. 161 lines 18-26, p. 162 lines 1-3).

The paradigm in the State of Louisiana is the use of the Intoxilyzer 5000 for determination of intoxication. It can be presumed that few, if any, officers administering the Intoxilyzer 5000 know the inner functions of this machine or how to repair it, although they are certified to <u>administer</u> the test. Consistent with its widespread use, the state established extensive

safeguards, through the *Louisiana Registry*, (Title 55, Public Safety) for the use, maintenance, calibration and admissibility of test results. The machine must be calibrated with a known sample within four (4) months of administration of a test to be used in evidence at trial (*Louisiana Registry*, Title 55 Public Safety Chap. 5 Section 501), and a certificate must be issued and filed in the records of the Clerk of Court in the judicial district in which the test is administered. Each inspector must be periodically re-certified, *Louisiana Registry*, (Title 55 Public Safety Chap. 5 Section 507).

These safeguards apply to detection of blood alcohol content, a much more exacting science than determining the veracity of statements made by a test subject. Yet, this record is silent on the existence of any such rules or regulations for the Arther VI.

This polygraphist disclosed other factors suggestive of the abstract, inexact and subjective nature of polygraphy.

1. "Q. We'll get to that in a minute. One other thing I want to touch on that you just gave in your explanation. So now you're telling me that during this test or to arrive at your conclusions, you relied on body language and demeanor of Johnny Evans.

   A. Well, it has - - It has some - - It has some play in it; but the bottom line is

the chart - - is the chart analysis." (Tr. p. 167 lines 15-21)

2. Q. And further, you stated, and I'll quote, "A positive truthful person would possibly have answered.., "quote, " I will pass because I know I did not do this thing," unquote, "etcetera." So what I'm getting to is, obviously, "should do good" is not a positive response is that, Mr. Trahan?

A. Well, no, it's not a positive response. You know, I'm going to pass this," is going to be a positive response." (Tr. p. 172 lines 2-6)

3. " . . . He swallowed at that particular point. That's a sign of relief from a person that was stressed by the particular question - - "(Tr. p. 157 lines 7 - 9)

4. " . . . the liar will tend to rate the polygraph on the low end of the scale. A truthful person would tend to rate it on a higher end of the scale . . . " (Tr. p. 131 lines 22-24)

5. " . . .when a questions places him under stress and <u>they are thinking about their</u>

heart rate increasing and everything, they're going to change their Breathing; and it's going to have a direct - - reflect directly down on the heart - - " (Tr. p. 149 lines 13-17)

(Emphasis Added)

6. " . . . Mr. Evans, in my opinion did not tell the entire truth on this particular issue" (Tr. p. 146 lines 11-12) **(Emphasis Added)**

7. "Q . . . I want to revisit one question. Can you distinguish between partial truths and lies on your test?"

   A. No, absolutely no." (Tr. p. 164 lines 21-23)

8. "Q. He interpreted the question to mean that you were indicating he was telling you lies on all questions up to that point."

   A. No; he didn't give me any indication of that. He didn't - - - Normally, when a person feels that way, they'll look at me and say: What, you're calling me a liar? And then I have to explain to them: No, no, no; I'm not calling you a liar; what I'm trying to do is to get these areas in your past out of they way so there's no -- - something don't show up on the

> chart that could be misinterpreted as that question." (Tr. p. 179 lines 2-4)

As stated by the Louisiana Third Circuit Court of Appeals:

> While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners . . . affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. 'Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examiner, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.' Thus, the skill of examiners fundamentally affects the ultimate reliability of the test However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, **there is no**

scientifically proven cause and effect connect- ion between an increase in the pertinent physiological reactions and "truth telling.

Indeed, some authors noted that "[t]he heart of the present critique of the polygraph is that **no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.** Furthermore, there is 'no known physiological response that is unique to deception,' and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, Heads or Tails: The Employee Polygraph Protection Act, 39 CATH.U.L. REV. 235, 264 (1989); *Johnny M. Evans, Sr. v. DeRidder Municipal Fire & Police Civil Service Board*, State of Louisiana, Court of Appeal, Third Circuit, Docket No. 01-118.

This record answers the remaining *Daubert*, supra requisites in much the same manner. "There is simply no consensus that polygraph evidence is reliable". *United States v.Scheffer,* supra.

The opinion of the polygraphist is also subject to the balancing test set forth in *Louisiana Code of Evidence* Article 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

Officer Evans was terminated from his employment solely as a result of the polygraph results. Consider this exchange:

MR. LESTAGE:

". . . Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired." (Tr. p. 82 lines 19-21)

* * *

MR. LESTAGE:

". . . I object to that. He asked - - He ordered the man, Mr. Evans, Sr., to undergo a polygraph examination to help in that determination. If the man had passed, he'd still be on force and on salary. I mean, it's that simple." (Tr. p. 115 lines 1-6)

It is not a difficult transition to consider the test result having identical conclusive effect with the members comprising the Civil Service Board at Officer Evans' hearing.

QUESTIONS NO. 3 AND 4 PRESENTED:

La. R.S. 33:2561, in pertinent part, establishes the procedure for an appeal of a civil service commission decision, as follows:

". . . and file the complete transcript with the designated court and that court thereupon shall proceed to hear and determine the appeal in a summary manner. The hearing shall be

> confined to the determination of whether the decision made by board was made in good faith for cause under the provisions of this Part. No appeal to the court shall be taken except upon these grounds." **(Emphasis Added)**

The Fifth and Fourteenth Amendments of the United States Constitution prohibit the deprivation of property without due process of law. In the case at bar, Officer Johnny Evans, Sr., was a classified civil servant as established in La. Const. Art. 10, Section 2(A), (and was subject to discipline as set forth in Section 8(A), and as further defined in La. R.S. Title 33). His job, therefore, constitutes a vested property right protected by the Fifth and Fourteenth Amendments of the United States Constitution. Termination can only be through and/or by due process of law. *AFSCME Council #17 v. St. ext rel DHH,* 789 So. 2d 1263 (La. 2001).

WHEN IS DUE PROCESS DUE?

The specific dictates of due process generally require consideration of three distinct factors:

1.) the private interest that will be affected by the official action;
2.) the risk of erroneous deprivation of such interest through the procedures used, and probable value of additional or substitute procedural safeguards; and,
3.) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. See *Matthews v.*

Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed 2d 18 (1976).

Simply put, a trial *de novo*, or an appellate review of reliability [see State v. Foret, 628 so. 2d 1116 (La. 1993) would adequately provide such safeguards, especially and/or particularly in any civil service hearing involving complex legal issues].

The dictates, prerequisites, and procedural safeguards imposed upon all trial courts by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 509 U.S. 579 (U.S. Cal. 1993) (for admissibility of scientific evidence) have been relegated to lay persons by the Louisiana Supreme Court with minimal consideration and without subsequent appellate *Daubert* review.

Experts have been the focus of public outrage and litigation strategy for years. In recent legal history, the ability of an expert to sway a jury or fact-finder has meant billions of dollars for insurance companies and accident victims. Expert testimony has basically eclipsed paternity litigation and has had a substantial impact in the criminal arena. The Louisiana Supreme Court's ruling condones the use of such testimony by lay persons-- in an arena totally devoid of a *de novo* review by a judicial tribunal. It constitutes the initial step over the precipice, down the slippery slope, toward use of a method, devoid of science, to determine

veracity and, therefore, outcome. Truly, 'Boudreaux and his box-o-gadgets' will rule the day under the Louisiana Supreme Court's decision.

To the contrary, the U.S. Supreme Court in *Daubert,* anointed the district judge as a "gatekeeper" for any expert evidence. The trial court is charged with the obligation of ascertaining the soundness of the science and the reliability of the method. This obligation requires scrutiny above and beyond a summary review as provided in Louisiana's Title 33. Such an obligation could be fulfilled only by a *de novo* review, or the review employed in *Foret*, *supra*. *Daubert* and the rights and complexities of substantive and procedural due process mandate a *de novo* review, (as in *Foret*) or a *de novo* hearing, as opposed to Louisiana's scheme under Title 33 of having the District Court sit as an appellate entity without the mandate to review quasi-legal findings.

In *North v. Russell*, 96 S. Ct. 2709, 49 L.Ed. 2d 534 (U.S. S. Ct. 1976) the Court considered the issue of whether Kentucky's system of allowing lay persons to act as trial judges for minor misdemeanors violated the Due Process Clause. The system under review, however, provided for a trial *de novo* in case of an appeal, automatically provided for bail and that a conviction be vacated in the event of appeal. In finding no constitutional infringement, the Court overwhelmingly relied on the availability of a trial *de novo* after any conviction:

> "The right to a new trial is absolute. A defendant need not allege error in the inferior court

> proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean . . . Prosecution and defense begin anew. . . The case is to be regarded exactly as if it had been brought there in the first instance". (citing from *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972)).

In the case at bar, the Louisiana Third Circuit Court of Appeals conducted the pertinent reliability inquiry:

> "If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, Heads or Tails: The Employee Polygraph Protection Act, 39 CATH.U.L.REV 235, 264 (1989); *Johnny M. Evans, Sr. v. DeRidder Municipal Fire & Police Civil Service Board.* State of Louisiana, Court of Appeal, Third Circuit, Docket No. 01-118.

The Louisiana Supreme Court has not only failed to conduct it's own inquiry, but has disregarded the only 'reliability' inquiry made in this case and chosen a basis for admissibility of polygraph based solely on policy reasons.

QUESTION NO. 5 PRESENTED:

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . "

Louisiana's counterpart to Federal Rule of Evidence Article 104(a), Louisiana Code of Evidence Article 104(a) states:

> **"A. Questions of admissibility generally.** Preliminary questions concerning the competency or qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . "

In *Daubert* 509 U.S. 592, 113 S. Ct. at 2796, the Supreme Court stated:

> "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the onset, pursuant to Rule 104 (a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue." (Emphasis Added) (Footnotes omitted).

In the absence of such a hearing, an appellate Court must remand (see *Caubarreaux v. E.I.DuPont De Nemours,* 714 So. 2d 67, (La. App. 3 Cir. 1998) or conduct a *de novo* review (see *State v. Foret*, 628 So. 2d 1116 (La. 1993). No authority or

justification exists for less consideration being extended to evidence adduced in an administrative hearing.

QUESTIONS NO. 6 & 7 PRESENTED:

The hearsay statements of Eric Pickens contain a plethora of inconsistencies. These inconsistencies were, in part, disclosed during Officer Evans' termination hearing (although strenuously objected to by counsel for the City of DeRidder as being irrelevant). Simply put, they are the statements of an individual who participated in a murder, made to feign cooperation with law enforcement, cast another party with involvement, and to extract revenge for Officer Evans' arresting him on August 14 (Tr. p. 87, lines 13-17). As noted by the Louisiana Third Circuit Court of Appeals, the statements contain, at a minimum, two (2) crucial contradictions. Many others, however, exist.

In the statement given on August 28, 1997, Mr. Pickens made no mention of being a participant in the murder of Ernest Prater. Additionally, he stated that Johnny Evans, Jr., was not present when this disclosure was made.

Next, in his statement given on August 31, 1997, Mr. Pickens alleged that the "leaked" information came from Johnny Evans, Jr.:

"Q. Okay, who told uh, who told that Ernest was ratting people out or . . .?

A. Johnny.

Q. How did he know?

A. He said those dudes on Bishop told him.

Q. On Bishop?

A. He didn't say no names. He said some niggers on Bishop told me that Ernie was the one ratting us out.

Q. He never told you nobody else at any time, had he . . he had learnt . . that Ernest, that was the first that you knew Ernest was ratting?

A. Yeah, then I went over there and him and his daddy was talking about it."

The pronoun "him" used in this last statement can only refer to Johnny Evans, Jr., who was the individual being discussed in pp. 1-8 of that statement. Thus, Johnny Evans, Jr., revealed that this information came from "those dudes on Bishop" street. Further, this statement was made at a location other than the home of Johnny Evans, Sr., as Mr. Pickens indicated, "Yeah, then I went over there . . . "In the questioning of Police Chief Arvin Malone, it was revealed that Eric Pickens had made an undercover purchase of drugs from J.J. Johnson.

MR. LESTAGE:

Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

CHAIRMAN WILLIAMS:

Sustained.

MR. JONES

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

CHAIRMAN WILLIAMS

No, sir.

MR. JONES

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a questions in order to complete my proffer.

CHAIRMAN WILLIAMS:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

MR. JONES:

That completes my proffer on that question, Mr. Chairman". (Tr. p. 107 lines 1-25 and p. 108 l 1)

Yet, in his statement of August 31, 1997, Mr. Pickens indicated a lack of knowledge of J.J. Johnson:

Q. Just you there. And he told you that , he had turned you and several more . . . J.J., who is he referring to as J.J.?

A. It's a dude named J.J. I don't know him, though."

Accordingly, it is respectfully submitted that the Honorable Third Circuit Court of Appeals correctly found these statement to lack credibility and trustworthiness.

Louisiana Code of Evidence Article 804 (B)(3) provides an exception to the hearsay rule for statements against interest. Mr. Pickens' statement on August 28, 1997 to Officer Johnson, Pine and Gott did not subject him to criminal liability. It is not a statement against his interest. At no time during that statement

did he profess to be a participant in or have distinct knowledge of the murder of Ernest Prater. Additionally, its inconsistency with the later statement given on August 31, 1997, gravitates toward inadmissibility under the hearsay exception provided by Article 804 (B)(6).

As to the admissibility of the statement given on August 31, 1997, this Honorable Court, in *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431 (1994), held that the term "statement" in *Federal Rule of Evidence* 804(B) (3), does not refer to an extended declaration such as a report or narrative in its entirety. *Louisiana Code of Evidence* Rule 804(B)(3) is identical to the federal counterpart.

> "The fact that a person is making a broadly self-inculpatory statement does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . "*Williamson*, Id. 2 p. 2435.

The *Williamson, Id.* majority held that the rule did not authorize admission of non-self-inculpatory statements made during the course of another's confession. The Louisiana Supreme Court adopted the *Williamson* rationale in *State v. Smith,* 643 So. 2d. 1221 (La. 1994) Subsequently, this interpretation was followed in *State v. Coates*, 661 So. 2d 571 (La. App. 2nd Cir. 1995), wherein the declarant implicated himself in the crime but attempted to place the ultimate blame on the defendant.

Finally, the City of DeRidder at the trial and appellate court review of this case, has argued for remand of this matter for rehearing due to the conclusion of criminal proceedings against its previously "unavailable" witness. In urging the admissibility of these statements under Article 804(B)(3), the City of DeRidder should concede that the portions pertinent to this proceeding were not "self-inculpatory". The Fifth Amendment, asserted by Pickens at the Civil Service hearing, does not protect against non-inculpatory statements or disclosures. The City of DeRidder had the right and/or obligation to request that the Chairman direct the witness to answer the questions relevant to that hearing, notwithstanding the witnesses urgence of the Fifth Amendment privilege against self incrimination. It chose not to do so. Nor would live testimony by Mr. Pickens negate the existence of inconsistencies and contradictions which rendered his hearsay statement untrustworthy. As counsel for the City of DeRidder astutely pointed out during this hearing,

> ". . .We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and its not - - certainly not for Chief Malone to decide now, nor to have decided on October 29. And we'd object to this line of questioning." (Tr. p. 105 lines 17-25, p. 106 lines 1-2)

Cross examination has been referred to as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 339 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed. 2d 489 (1970) (quoting 5 J. WIGMORE, EVIDENCE, Section 1367). In the case at bar, that asset was denied to the petitioner.

DUE PROCESS AND THE RIGHT TO CROSS-EXAMINE WITNESSES

The Louisiana Supreme Court erred in considering the hearsay statements (of a convicted murderer) as substantive evidence when Officer Evans was deprived of the right of cross-examination.

The right to cross examination is not limited to judicial proceedings. Where a decision or outcome depends on a question of fact, due process mandates an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Never is this so critical as when the evidence is from an individual who might be a perjurer, or a person motivated by malice, vindictiveness, intolerance or prejudice (such as here, Officer Evans previously arrested Pickens and Officer Evans' son supposedly was the reason he was ultimately convicted of manslaughter). The right to show this falsity, in such instances, depends on and requires cross examination.

As stated by the Supreme Court of the United States:

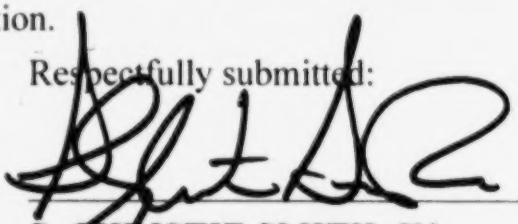
"THIS COURT HAS BEEN ZEALOUS TO PROTECT THESE RIGHTS FROM EROSION. IT HAS SPOKEN OUT ONLY IN CRIMINAL CASES, . . . BUT ALSO IN ALL TYPES OF CASES WHERE **ADMINISTRATIVE** . . . ACTIONS WERE UNDER SCRUTINY" Green v. McElroy, 360 U.S. 474, 496-497 (1959). (Emphasis Added).

CONCLUSION

Officer Johnny Evans, Sr., was a member of the United States Army for twenty-two (22) years and was honorably discharged at the rank of E-7, Sergeant First Class. He was classified with a top secret clearance rating for the last eighteen (18) of those years (Tr. p. 48, lines 13-14). After two (2) years with the Beauregard Parish Sheriff's Office, he joined the force of the DeRidder City Police on April 5, 1993. While with the DeRidder City Police he reported his own family members to the Beauregard Parish Narcotics Task Force for possible drug involvement. His exemplary record itself contradicts the allegations made against him. For the foregoing reasons, the

decision of the Louisiana Supreme Court should be reversed and the petitioner should be re-instated to his position with the DeRidder City Police with back pay including interest from the date of his termination.

Respectfully submitted:



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